

***UNITED STATES - COUNTERVAILING DUTIES
ON CERTAIN CORROSION-RESISTANT CARBON
STEEL FLAT PRODUCTS FROM GERMANY***

WT/DS213

**SECOND WRITTEN SUBMISSION
OF THE
UNITED STATES OF AMERICA**

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I. INTRODUCTION

1. We are now midway through this very straightforward dispute. The questions generated by the Panel after the first meeting address most of the issues arising in this case, and the United States' answers to those questions are separately provided together with this submission. Given the comprehensive nature of the Panel's questions, the United States intends to use this second submission to highlight the major legal and factual errors underlying the EC's claims.

2. At the outset, the United States reiterates that most of the EC's claims can be disposed of merely by applying fundamental principles of treaty interpretation. With respect to the EC's systemic challenge to U.S. sunset review procedures, the EC asserts that the initiation standards and *de minimis* requirement of Article 11 must be read into Article 21.3. The EC's assertion, however, finds no support in the SCM Agreement and runs afoul of basic principles of treaty interpretation reflected in Article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), which "neither require nor condone the imputation into a treaty of words that are not there"¹ The Panel should reject the EC's assertion and refuse to impute into Article 21.3 of the SCM Agreement "words that are not there."

3. The EC also is wrong with respect to its case-specific claims regarding the sunset determination by the U.S. Department of Commerce ("Commerce") in corrosion-resistant carbon steel flat products from Germany. Commerce's determination that the expiry of the countervailing duty order would be likely to lead to the continuation or recurrence of subsidization is based on the continued existence and availability of the two programs² previously found to have been used by German producers and the continued existence of benefit streams from the CIG program previously found to benefit German producers. The EC has not disputed or refuted these facts. Thus, the Panel should reject the EC's claims concerning Commerce's sunset determination.

4. With this overview of the case as background, the United States will now briefly discuss some of the specific issues that have been raised in the case.

¹ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India Patent Protection*"), WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45.

² The two programs are the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b). Both of these programs still exist. Furthermore, during the sunset review, the German Government, the EC, and German producers admitted that both of these programs continued to provide some benefits. See *Commerce Sunset Preliminary Decision Memorandum*, p.12-14 (Exhibit EC-7).

II. WITH RESPECT TO ITS CLAIMS CONCERNING U.S. SUNSET REVIEW PROCEDURES, THE EC HAS FAILED TO DEMONSTRATE THAT THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ANY OBLIGATION UNDER THE SCM AGREEMENT

4. As noted, the Panel can dispose of the EC's claims concerning U.S. sunset review procedures simply by applying basic rules of treaty interpretation. Article 3.2 of the DSU directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention* reflects customary rules of interpretation. Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*." (Emphasis added). In applying Article 31, however, the Appellate Body has cautioned that an interpreter's role is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 "neither require nor condone the imputation into a treaty of words that are not there"³ It goes without saying that a panel cannot "clarify" a treaty provision that does not exist.

A. Automatic Self-Initiation of Sunset Reviews Is Consistent with the SCM Agreement Because Article 21.3 Explicitly Authorizes Authorities to Initiate Sunset Reviews on Their Own Initiative

5. The EC alleges that the provisions of U.S. law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the SCM Agreement. For purposes of evaluating the EC's claims, customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. Therefore, the analysis begins with the text of Article 21.3, which provides:

Notwithstanding the provisions of paragraphs 1^[4] and 2^[5], any definitive countervailing duty shall be terminated on a date not later than five years from its imposition . . . , unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on

³ *India Patent Protection*, para. 45; see also *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Report of the Appellate Body circulated 15 February 2002 (unadopted) ("[W]ords must not be read into the Agreement that are not there.").

⁴ Paragraph 1 of Article 21 provides that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."

⁵ Paragraph 2 of Article 21 is relevant to types of reviews, other than sunset reviews, such as countervailing duty assessment reviews. See, e.g., *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("UK Lead Bar"), WT/DS138/AB/R, Report of the Appellate Body adopted 7 June 2000, para. 53.

behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.⁵² The duty may remain in force pending the outcome of such a review.

⁵² When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

6. The plain text of Article 21.3 clearly and unambiguously permits authorities to initiate a review on “their own initiative.” Notwithstanding this clear and unqualified text, the EC argues that authorities should not be able to self-initiate sunset reviews unless they have first satisfied the evidentiary requirements for the initiation of an investigation under Article 11. The EC believes that this is so because, according to the EC, a “parallelism” exists between the investigation and sunset review provisions of the SCM Agreement.⁶ The EC’s parallelism theory is just that – a theory. Under customary rules of treaty interpretation, a theory cannot overcome the ordinary meaning of the words of a treaty, taking into account their “context” and the “object and purpose” of the agreement.

7. If, as the EC posits, the SCM Agreement implicitly incorporates a parallelism between investigation and sunset review provisions, why then did the Members feel it necessary to provide *explicitly* that the evidentiary and procedural requirements for conduct of an investigation in Article 12 are made applicable in the conduct of sunset reviews *pursuant to Article 21.4*? Where Members wished to have an obligation set forth in one provision apply in another context, they did so expressly. The fact is that the Members chose not to incorporate the evidentiary requirements of Article 11.6 for the self-initiation of sunset reviews. The Panel should decline the EC’s request to create an evidentiary obligation for self-initiation under Article 21.3 where no textual support exists for such an interpretation.

B. There is No *De Minimis* Standard for Sunset Reviews in the SCM Agreement

8. The other systemic challenge by the EC involves its claim that the *de minimis* standard of Article 11.9 applies to sunset reviews under Article 21.3. As the United States demonstrated in its First Written Submission and Oral Statement, nothing in Article 21.3 or elsewhere in the Agreement establishes a *de minimis* standard for sunset reviews. Furthermore, a contextual analysis of Article 21.3, in light of the object and purpose of the SCM Agreement and the particular provisions at issue, provides no support for the EC’s claim that the Article 11.9 *de minimis* standard is applicable in sunset reviews under Article 21.3. Once again, the EC is asking the Panel to read into Article 21.3 “words that are not there.”

⁶ EC Oral Statement, paras. 13-15.

9. The EC has failed to refute the United States' textual and contextual arguments. Instead, the EC attempts to commingle its factual, case-specific claims regarding the Commerce sunset determination on corrosion-resistant steel with the separate, purely legal issue of whether the Article 11.9 *de minimis* standard applies to sunset determinations under Article 21.3.⁷ The factual and the legal issues are distinct, however, and the United States has addressed them separately in significant detail in its First Written Submission and Oral Statement. In addition, the United States addresses certain of the EC's factual claims in more detail below.

10. With respect to the purely legal issue, the EC merely reiterates its previous argument that the *de minimis* standard for investigations contained in Article 11.9 "should" apply in sunset reviews conducted pursuant to Article 21.3 because investigations and sunset reviews serve the same purpose.⁸ The United States disagrees. The purpose of an investigation is to determine whether and to what extent subsidization exists. In this context, the function of the one percent *de minimis* standard contained in Article 11.9 is to determine whether foreign government subsidies warrant the imposition of a countervailing duty in the first instance. Using the example given in our First Written Submission (para. 80), if the investigating authority found that a government program had provided recurring subsidies at a rate of more than one percent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury. In contrast, the focus of a sunset review is the future, *i.e.*, whether subsidization is likely to continue or recur. Therefore, the mere continued existence of a subsidy program could warrant maintaining the duty beyond the five-year point, *even if the amount of the subsidy were currently zero*, because subsidization may be likely to recur absent the discipline of the countervailing duty. To read a particular *de minimis requirement* for sunset reviews into the Agreement would render footnote 52 a nullity.

11. In its Oral Statement, the EC opined that the United States has confused the purposes of an administrative (*i.e.*, assessment) review and a sunset review and the application of footnote 52.⁹ It is the EC that is confused. Pursuant to Article 21.3 and footnote 52, the mere existence of a subsidy program, even with a net countervailable subsidy rate of zero, could form the basis for a determination of likelihood of future subsidization in accordance with Article 21.3 and footnote 52. The United States agrees with the EC that footnote 52 refers to a situation where the authority determines that the subsidy rate for a particular time period is zero and that, in the United States, that determination takes place in the context of an administrative review.¹⁰ The

⁷ See EC Oral Statement, para. 38.

⁸ EC Oral Statement, para. 37.

⁹ EC First Oral Statement, para. 44.

¹⁰ EC Oral Statement, para. 44. Although not germane to the instant dispute, the United States does not agree with the EC's statement that footnote 52 refers to a situation where a subsidy is "*de minimis*" in an administrative review. Footnote 52 only discusses a finding in the most recent assessment proceeding that "no

(continued...)

EC seems to think, however, that footnote 52 serves no other purpose than to make a point about administrative reviews. The EC posits that “[s]unset reviews under Article 21.3 are completely different from administrative reviews.” If that is so, why did the Members include footnote 52 in Article 21.3, the provision governing sunset reviews? There must be a reason.

12. The United States considers that footnote 52 means that the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC has not offered any alternative interpretation. The reason for this gap in the EC’s argumentation is that the EC’s claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would, if accepted, render note 52 meaningless.

13. In sum, the EC’s claim that a *de minimis* standard exists for sunset reviews under Article 21.3 is without merit. Applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the SCM Agreement.

III. WITH RESPECT TO COMMERCE’S SUNSET DETERMINATION INVOLVING CORROSION-RESISTANT STEEL FROM GERMANY, THE EC HAS FAILED TO DEMONSTRATE THAT THE UNITED STATES ACTED INCONSISTENTLY WITH ANY OBLIGATION UNDER THE SCM AGREEMENT

14. In the original countervailing duty investigation, Commerce determined that German producers of corrosion-resistant steel benefitted from five different subsidy programs. In the sunset review, Commerce made the following findings with respect to these five programs:¹¹

1. Capital Investment Grants (“CIG”). The benefit streams from non-recurring grants will continue beyond the five-year mark.
2. Structural Improvement Aids. The program has been terminated.
3. Special Subsidies for Companies in the Zonal Border Area. The program has been terminated.
4. Aid for Closure of Steel Operations. The program continues to exist.
5. ECSC Redeployment Aid Under Article 56(2)(b). The program continues to exist.

¹⁰ (...continued)
duty” is to be levied.

¹¹ *Commerce Sunset Preliminary Decision Memorandum*, pp.24-29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10).

15. Commerce also found that two additional subsidy programs which were found to provide a zero-benefit to corrosion-resistant products in the period of investigation still existed: ECSC Article 54 Long-Term Loans, and Interest Rebates on ECSC Article 54 Loans.¹²

16. Significantly, the EC has not disputed the facts which form the basis for Commerce's sunset determination. On the contrary, the EC admits in its Oral Statement that payments under the CIG program were made as late as February 1990.¹³ The EC also admits in its Oral Statement that the Aid for Closure of Steel Operations and the ECSC Redeployment Aid under Article 56(2)(b) programs continue to exist.¹⁴ Also, during the sunset review itself, the German Government, the EC, and German producers admitted that both of these programs continued to provide some benefits.¹⁵

17. The EC, however, continues to assert that Commerce acted inconsistently with the SCM Agreement by failing to consider the CIG program terminated and its benefits expired based on the EC's theory that a *de minimis* standard of one percent is required in sunset reviews. Based on this theory, the EC argues that Commerce should have terminated the countervailing duty.

18. In advocating this position, the EC misconstrued, in its Oral Statement, the United States' position with respect to the CIG program and the effect of footnote 52.¹⁶ Concerning the CIG program, Commerce determined that benefits from the non-recurring grants would continue beyond the five-year mark.

19. With respect to the effect of footnote 52 in sunset determinations, the United States stated in its First Written Submission that "[t]he mere continued existence of this same program could warrant maintaining a duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization may recur absent the discipline of the duty."¹⁷ *The reference to the "same program" was not to the CIG program, per se*, but to a hypothetical program discussed by the United States as an example in the preceding paragraph 80 in drawing a distinction between the object and purpose of an investigation versus the object

¹² *Commerce Sunset Preliminary Decision Memorandum*, p.29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10). In the investigation, Commerce determined that long-term loans under ECSC Article 54 had been provided to the following German producers of corrosion-resistant carbon steel flat products: Hoesch, Preussag, and Thyssen. Commerce also determined that Preussag and Thyssen received interest rebates with respect to interest expenses incurred on ECSC Article 54 loans. See *Commerce Investigation Final*, 58 FR at 37316-21 (Exhibit EC-2).

¹³ EC First Oral Statement, para. 26. Using the 15-year allocation period, the benefit stream from subsidies received after 1985 would continue past the five-year mark (*i.e.*, January 1, 2000).

¹⁴ EC First Oral Statement, para. 39.

¹⁵ See *Commerce Sunset Preliminary Decision Memorandum*, p.12-14 (Exhibit EC-7).

¹⁶ EC First Oral Statement, para. 44.

¹⁷ US First Submission, para. 81 (emphasis in original).

and purpose of a review.¹⁸ In its sunset determination, Commerce found that the CIG program was terminated, but its benefit stream continued past the sunset review period. In paragraph 81, however, the United States was explaining that footnote 52 stands for the proposition that an existing subsidy program could be the basis for a determination in a sunset review that the expiry of the countervailing duty would likely lead to the continuation of subsidization even if Commerce found a net countervailable subsidy rate of *zero* attributable to that program in the most recent administrative review.

20. Article 11 of the DSU directs panels to make an “objective assessment” of the facts of the case. The facts in this case include the continuation of benefit streams and the continued existence and availability of countervailable subsidy programs previously found to have been used by German producers of corrosion-resistant steel. The Panel’s objective assessment of these facts should result in a finding that Commerce’s determination was not inconsistent with the SCM Agreement.

IV. CONCLUSION

21. Based on the foregoing, the United States renews its request that the Panel make the findings described in paragraph 127 of its First Written Submission.

¹⁸ US First Submission, para. 80.